(6)

No. 05-653

IN THE

Supreme Court of the United States

OCTOBER TERM 2005

BRONCO WINE COMPANY and BARREL TEN QUARTER CIRCLE, INC.,

Petitioners,

v.

JERRY R. JOLLY, Director of the California Department of Alcoholic Beverage Control; CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; and the NAPA VALLEY VINTNERS ASSOCIATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

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A. THE CALIFORNIA SUPREME COURT'S PREEMPTION HOLDING SQUARELY CONFLICTS WITH SETTLED LAW.

Respondents deny any conflict between federal law and California's Section 25241, asserting that the "overriding purpose" of both is to prevent consumer deception in labeling of alcoholic beverages. NVVA Opp. 15; *accord* Dept. Opp. 13. But as this Court has repeatedly held, even when federal and state law have a common goal, state law is preempted if it "interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)); *accord Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) (the "fact of a common end" does not entitle a state to use "conflicting means" to achieve that end); *see* Pet. 15.

In the exercise of its lawful authority to promulgate uniform "national rules" governing the labeling of alcohol, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995), TTB chose to regulate potentially misleading grandfathered geographic brand names, not by prohibiting them outright, but by expressly authorizing their use *if* accompanied by certain additional disclosures. *See* 27 C.F.R. §4.39(*i*)(2)(ii); 51 FED. REG. 20,480, 20,482 (June 5, 1986). TTB then issued scores of label-specific Certificates of Label Approval ("COLAs") authorizing Petitioners to use the labels at issue in this case in interstate commerce after reviewing them "on a case-by-case basis to determine whether any particular label is likely to mislead consumers, including as to the origin of the product." 66 FED. REG. 29,476, 29,478 (May 31, 2001). The California statute eviscerates the carefully crafted federal grandfather clause and nullifies these COLAs, trampling individual rights expressly granted by federal law and frustrating the indisputable federal interest in maintaining a uniform system of "national rules." *Coors Brewing Co.*, 514 U.S. at 480. The California Supreme Court's decision upholding that statute, in turn, squarely

conflicts with numerous decisions of this Court invalidating state laws that ban conduct specifically authorized by federal laws, regulations, or other regulatory grants of permission. Pet. 11-16. Further, that decision invites each of the 50 states to override TTB's regulatory judgments whenever they see fit.

Respondents protest that the grandfather clause cannot be construed as a "license to mislead." NVVA Opp. 15. Precisely so: the grandfather clause authorizes use of labels that the agency has concluded are *not* misleading. On this point, there can be no serious dispute: TTB's conclusion that an appellation of origin or "some other statement" could "dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine" is stated explicitly in the regulation. 27 C.F.R. §4.39(*i*)(2)(iii). Indeed, as Respondents concede, TTB could not lawfully have adopted the grandfather clause *unless* it had concluded that the provisions adequately met the agency's statutory obligation to regulate so as to "prevent consumer deception." 27 U.S.C. §205(e); *see* Dept. Opp. 22. If Respondents believed that the grandfather clause violated TTB's statutory mandate, they should have challenged the regulation under the Administrative Procedure Act rather than procuring a conflicting state statute.

Contrary to Respondents' contentions, the mere brevity of the discussion of the agency's reason for the grandfather clause does not obscure or undermine the rule's preemptive force. First, an agency's background intent in adopting a regulation is irrelevant to preemption analysis where, as here, the regulation is unambiguous in scope and effect and the conflict with state law is clear. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000). In any event, TTB's statement of purpose succinctly confirms that the grandfather clause was intended to "provide industry with sufficient flexibility in designing their labels, while at the same time *providing consumers with protection* from any misleading impressions that might arise from the use of geographic

brand names." 51 FED. REG. at 20,482 (emphasis added); *see also id.* at 20,481 (noting evidence that geographic brand names had developed significant following among consumers who understood that the brand names did not identify the wine's origin).

Echoing the California Supreme Court's distinction "between (1) not making an activity unlawful, and (2) making that activity lawful," App. 64a, Respondents contend that TTB intended Section 4.39(*i*)—and, indeed, all of its regulations and COLA requirements—merely as a set of "minimum standards," which the states could supersede with stricter rules. NVVA Opp. 17. But whatever may be the case with certain other labeling provisions, neither the explicit text of Section 4.39(*i*) nor its regulatory history indicates that the agency intended to permit states to outlaw the very brand names that the regulation specifically sought to preserve in the marketplace.[1] Rather, the regulation and its history reveal the agency's particular desire to avoid "having a whole class of brand names become totally unusable." 49 FED. REG. 19,330, 19,332 (May 7, 1984).

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[1]Respondents cite another federal regulation that specifically contemplates that states may regulate certain aspects of winemaking. NVVA Opp. 5 (citing 27 C.F.R. §4.25a). No party has suggested that the use of *brand names* is covered by this regulation, and it is not. *See* App. 152a. Likewise, nothing about TTB's January 1986 comment regarding Oregon's "more stringent" wine rules suggests any intent that its subsequently-adopted geographic brand rule be merely a "minimum standard." *See* NVVA Opp. 5-6 (citing 51 FED. REG. 3773, 3774 (Jan. 30, 1986)). As for Respondents' assertion that TTB did not "take into account local conditions" affecting the use of specific brand names when it adopted Section 4.39(*i*) and therefore would condone state "supplementation" of its regulation, NVVA Opp. 7; *see* Dept. Opp. 11, it goes without saying that, to create an effective system of "national rules" (*Coors Brewing Co.*, 514 U.S. at 480), TTB necessarily had to ignore parochial interests in favor of 50-state uniformity. That fact, if anything, underscores the conflict posed by Section 25241's piecemeal exception to the federal rule.

Ultimately, the various theories by which the California Supreme Court and Respondents attempt to conjure away the conflict between California's Section 25241 and TTB's Section 4.39(*i*) fail. That conflict is virtually indistinguishable from the conflicts repeatedly found by this Court to be preemptive, from *Gibbons v. Ogden* to *Ray v. Atlantic Richfield Co.* and beyond. *See* Pet. 12-13. To characterize Section 4.39(*i*) as a non-preemptive "minimum standard" would create a novel exception that would swallow the settled rules of implied preemption.

In short, the federal regulation at issue reflects the considered judgment of TTB to authorize the continued use of certain brands on the basis that they are not incurably deceptive. Even if California's Section 25241 shares the consumer-protection goal of federal alcohol labeling law, that statute "interferes with the methods by which the federal statute was designed to reach this goal" and hence is preempted. *Int'l Paper Co.*, 479 U.S. at 494. The California Supreme Court's decision upholding that statute squarely conflicts with this Court's settled approach to conflict preemption and invites a patchwork of conflicting state labeling laws that would heighten, rather than dispel, consumer confusion and impair, rather than promote, interstate commerce in alcoholic beverages.

B. THE CALIFORNIA SUPREME COURT'S INDISPUTABLE RELIANCE ON THE PRESUMPTION AGAINST PREEMPTION CANNOT BE RECONCILED WITH DECISIONS OF THIS COURT AND COURTS OF APPEALS.

Respondents' suggestion that the "presumption against preemption" was unnecessary to the California Supreme Court's decision, (NVVA Opp. 19), is wishful advocacy, to put it charitably. The California Supreme Court's reliance on the presumption was explicit and unequivocal. Indeed, the court devoted the vast majority of its opinion to analyzing whether the history of state and federal alcohol

regulation warranted application of the presumption (App. 11a-59a), at the conclusion of which the court stated (App. 59a):

> Having concluded that Bronco has failed to carry its burden of establishing clear or manifest intent on the part of Congress, or congressional intent as interpreted by the [TTB], to preempt the traditional exercise of state police power such as the wine labeling regulation found in section 25241, we proceed under the presumption that no such preemption was intended. We bear this presumption in mind when we consider below Bronco's assertion that section 25241, by imposing a labeling requirement that is more exacting than the federal requirement, is impliedly preempted by federal law.

By imposing, in a case of conflict preemption, a "burden of establishing clear or manifest intent on the part of Congress, or congressional intent as interpreted by the [agency]" in order to avoid a "presumption against preemption," the California Supreme Court's decision conflicts with decisions of this Court and the Fifth and Eleventh Circuits. *See Geier*, 529 U.S. at 884 ("[T]he Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists."); Pet. 16-21 (discussing appellate cases).

Respondents cite *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 716 (1985), and *New York v. FERC*, 535 U.S. 1 (2002), for the proposition that "this Court has [not] refused to apply the presumption against preemption in cases involving a claim of implied conflict preemption." NVVA Opp. 21. In *Hillsborough*, a pre-*Geier* case, this Court referred to a "presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." 471 U.S. at 716. This statement is not an endorsement of a broad

presumption against preemption in all conflict cases,[2] nor does it posit any burden of proving clear or manifest intent on the part of Congress or a federal agency in order to avoid such a presumption. As for *New York v. FERC*, that case did not "concern the validity of a conflicting state law or regulation." 535 U.S. at 18. Rather, the case addressed a predicate question of whether a federal statute did or did not authorize *any* federal regulation in a field that had been under the jurisdiction of the states.

Respondents similarly fail in their effort to harmonize the California Supreme Court's decisions with holdings of the Fifth and Eleventh Circuits. *See* Pet. 17-19. The Fifth Circuit's decision in *Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005), addressed the very narrow category of joint federal-state benefits programs, in which "[w]e start with 'a presumption that the state statute is valid.'" *Id.* at 336 (citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661 (2003)). Even at that, however, the Fifth Circuit made clear that "a state eligibility standard that altogether excludes entities that might otherwise be eligible for federal funds is invalid under the Supremacy Clause." *Id.* at 337. That is precisely the situation here: the state's "eligibility standard" for use of geographic brand names "altogether excludes" brands that are authorized under federal law. As for the Eleventh Circuit cases cited by Respondents, those are inapposite because they involved either *field* preemption, *see Cliff v. Payco General American Credits, Inc.*, 363 F.3d 1113, 1124-31 (11th Cir. 2004), or *express* preemption, *see Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521 (11th Cir. 1994); *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1327-28 (11th Cir. 2001). None of those cases considered the question of whether to apply the presumption to a conflict between federal and state law or

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[2]As Respondents have conceded, no question of health or safety is posed by the labeling practices here. *See* App. 14a n.13.

whether to require evidence of preemptive federal intent to avoid such a presumption.[3] The conflict in the case law over those questions calls for resolution by this Court.

Finally, even if the presumption against preemption were not categorically inapplicable in a case of clear conflict, Respondents concede, as they must, that under *United States v. Locke*, 529 U.S. 89 (2000), the existence of a "federal presence" in a regulatory field may preclude application of the presumption against preemption. *See* NVVA Opp. 24. Respondents do not specifically address the substantial confusion in the case law regarding the extent and duration of the "federal presence" necessary to trigger *Locke*, but they do at least concede, contrary to the decision below, that the "presence" need not date back to the "beginning of our Republic." Respondents further acknowledge that some federal appellate courts have applied the *Locke* exception in cases involving regulatory schemes enacted contemporaneously with, or well after, enactment of the Federal Alcohol Administration Act. *See* cases cited at Pet. 22. While Respondents vaguely assert that the California Supreme Court properly construed and applied *Locke*, they do not attempt to square the court's ruling with those federal appellate decisions, nor do Respondents explain why, if the federal presence need not date back to the "beginning of our Republic," the court below felt compelled to look for precisely such a hoary "presence."

This is not a case in which the federal government has just entered a regulatory field long occupied exclusively by

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[3]Respondents erroneously assert that the Eleventh Circuit decisions rejecting the presumption against preemption in cases of federal-state conflict were "expressly abrogated" by this Court's decision in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). Although the specific holding of *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), was overruled by *Sprietsma*, this Court did not address the Eleventh Circuit's views regarding the inapplicability of the presumption in conflict-preemption cases.